

**PREPARED STATEMENT OF THE**

**COALITION FOR AUTO REPAIR EQUALITY**

**before the**

**SUBCOMMITTEE ON COMMERCE, TRADE, AND**

**CONSUMER PROTECTION**

**COMMITTEE ON ENERGY AND COMMERCE**

**U.S. HOUSE OF REPRESENTATIVES**

**on**

**Right to Repair: Industry Discussions and Legislative**

**Options**

**November 10, 2005**

## **I. INTRODUCTION**

Mr. Chairman and members of the Committee, I am David Parde, President of the Coalition for Auto Repair Equality or CARE. CARE appreciates the opportunity to appear before you today to discuss the right to repair issue, as well as CARE's discussions with automobile industry representatives regarding a self-regulatory program to address these problems, and the legislative option presented by H.R. 2048, 'The Motor Vehicle Owners' Right to Repair Act of 2005.

The Coalition for Auto Repair Equality is a national, nonprofit organization representing companies in the \$200 billion-a-year, five million employee automotive aftermarket industry. CARE's members operate businesses at 34,820 locations throughout the United States. Of these, 15, 270 are automobile maintenance and/or repair facilities where consumers often bring their cars to be worked on by automotive technicians. Our members include repair shops such as Midas and Jiffy Lube, and companies that sell replacement parts to "do it yourselfers" and independent repair shops, such as Advance Auto Parts, O'Reilly's Auto Parts, and Auto Zone. Other members include CAR QUEST and NAPA, companies that sell parts through retail stores and provide repair services through individually owned, franchised shops.

Because CARE was involved in the discussions regarding a proposed self-regulatory system, I will first focus on those efforts, and then provide CARE's views regarding H.R. 2048.

## **II. INDUSTRY SELF REGULATION**

### **A. Why the Current System is Not Effective**

The National Automotive Service Task Force (NASTF) is a loosely organized, voluntary task force funded by the automobile manufacturers. It was formed in 2000 purportedly to resolve issues or problems relating to the availability of diagnostic and repair tools and information for motor

vehicles. Our experience shows that NASTF operates only as a clearinghouse for complaints from independent repair facilities. NASTF receives complaints related to the failure of an automobile manufacturer to make certain information available and then forwards the complaint to the manufacturer to resolve. Once it receives a response from the manufacturer, NASTF communicates the response to the repair facility. It does not apply standards regarding when and how such complaints should be resolved, and does not attempt to resolve complaints regarding the availability of information. Moreover, there is no transparency or accountability built into the NASTF process. When measured against standards for effective self-regulatory programs enunciated by the Federal Trade Commission, the NASTF program receives a failing grade. In fact, in a letter to the Alliance of Automobile Manufacturers from the FTC (attached as Exhibit A), the agency staff indicated that industry programs must be backed up by a system of enforcement, incorporating independent, third-party review. According to the FTC, such independent review should: (1) be impartial and objective; (2) be transparent or public; and (3) apply standards consistently. The FTC letter explains that independent review ensures that individual companies or other industry members are not the sole arbiters of whether their practices comply with relevant standards. As described above, NASTF's review system fails to incorporate even one of the elements of an effective third-party review system.

In addition, the FTC has long stressed the need for self-regulatory programs to include some form of sanctions for non-compliance with codes or standards. Such sanctions may include referral of complaints to the FTC, as is the case with several different programs sponsored by various segments of the advertising industry. In fact, the FTC stated to Congress in a 2000 Report to Congress on Online Profiling that: [t]he bedrock of any effective self-regulatory or legislative scheme is enforcement. In a self-regulatory context, this means that nearly all industry members subject

themselves to monitoring for compliance by an independent third party and to sanctions for non-compliance." The current NASTF system, however, provides no such mechanism for enforcement. There is little doubt that these structural inadequacies have contributed to NASTF's failure to facilitate the disclosure of service information to aftermarket technicians, as well as the mistrust that has developed among the vast majority of the aftermarket industry regarding NASTF's ability to correct the kind of problems described in the next panel by Mr. Bob Everett, NFIB's representative and the only service technician to have participated in the discussions regarding the self-regulatory program.

#### **B. Recent Efforts to Achieve an Effective Self-Regulatory Program**

Following the introduction of H.R. 2048, CARE, together with representatives from the Automotive Aftermarket Industry Association (AAIA), the Alliance of Automobile Manufacturers (Alliance), the Association of International Automobile Manufacturers (AIAM), the Automotive Service Association (ASA), and the National Auto Dealers Association (NADA), at the request of Chairman Joe Barton and Senator Lindsey Graham, engaged in a series of discussions this summer over a two month period in an attempt to develop a voluntary industry self-regulatory program that would obviate the need for the proposed legislation. These talks were facilitated by representatives of the Council of Better Business Bureaus (CBBB) and monitored by the Federal Trade Commission staff. As you are aware, the talks were concluded without a final resolution that would ensure the timely disclosure of automotive repair, diagnostic and tool information to the aftermarket industry to the same extent such information is made available to franchised dealerships. Although significant progress had been made toward developing a workable program with an enforcement component, and the participants mutually agreed to continue negotiating for an additional month beyond the initial deadline, the automobile manufacturer contingent ultimately refused to agree to provisions that CARE believes are critical elements of a workable program.

The program under discussion would have required automobile manufacturers to commit in writing to abide by a set of “voluntary standards” for making information and tools available to the aftermarket in a similar manner and to the same extent as such information is made available to the dealerships. The standards also set out a process to enforce the commitment made by each company. Under the program, technicians seeking information or tools to repair a vehicle but unable to locate the necessary information would first be required to contact a representative of NASTF to obtain assistance. The parties had agreed that NASTF would be reconstituted and employ trained service technicians who would act as a “buffer” between the technician and the manufacturer to determine if the information was available, and if not, to make a recommendation about whether it should be made available.

In the event the necessary information was not provided in accordance with the time requirements of the proposed NASTF process, the technician could bring the complaint to an independent, third party dispute resolution program. Pursuant to certain procedures and time constraints, the third party enforcement entity would render a “binding” decision regarding whether the information in dispute should be made available in accordance with the voluntary standards agreed to by the manufacturer. Any manufacturer faced with a negative final decision would be required to provide the information to both the technician that brought the complaint and to the aftermarket in general, and pay a penalty for non-compliance.

Throughout these discussions, CARE’s primary objectives were to achieve a program that would be effective in expeditiously communicating needed information to service technicians in a fair and impartial manner, and in incorporating the elements articulated by the FTC for an acceptable self-regulatory system. It is important to note that our goal was to impose the same requirement articulated in HR 2048 that information should be provided to the aftermarket in a similar manner and to the same extent as such information is provided to franchised dealerships. Although the

manufacturer contingent stated that it agreed in principle with this goal, it ultimately backed away from this commitment, as demonstrated below.

### **C. Issues in Dispute**

#### **1. NASTF Governance**

During the discussions facilitated by the CBBB, the manufacturers acknowledged some of NASTF's shortcomings, and had agreed to form a reconstituted organization and hire professional staff to assist technicians seeking service, training or tool information from an automotive manufacturer. The new NASTF would have had the authority to seek the service information on the technician's behalf and communicate directly with the manufacturer pursuant to a specified process. In the event the manufacturer failed to provide the information, the NASTF staff would prepare a written report of its efforts to resolve the inquiry with the manufacturer and make a recommendation as to whether the manufacturer should make the information available to the technician. In the event that either party disagreed with the recommendation, that party would proceed to have the dispute resolved by the independent, third party enforcement entity.

In light of NASTF's poor track record, however, CARE was initially skeptical about whether NASTF was the appropriate body to expeditiously resolve disputes regarding the accessibility of information. Nonetheless, we were willing to allow NASTF to act as the first response for service information requests provided that unambiguous, specific safeguards were put in place to ensure that the newly reconstituted structure would be successful in implementing the goals of the self-regulatory program, and that the third party enforcement entity would provide an avenue to either enforce a NASTF decision or challenge its correctness. The most important safeguard, in our view, was the creation of a fair and balanced Board of Directors of NASTF.

CARE and AAIA therefore proposed that initial funding for the reconstituted NASTF be equally divided between the aftermarket industry through CARE and AAIA, and the automobile

manufacturing industry through the Alliance, AIAM, ASA and NADA. We further proposed that NASTF be administered by a Governing Board comprised of eight members, four of whom would be designees of CARE and AAIA, and four of whom would be designees of the Alliance, ASA, NADA and AIAM. This allocation of membership was to ensure that both the aftermarket and the manufacturer representatives to the discussions would have equal presence on the board. Nonetheless, CARE remained open to increasing or decreasing the size of the board, provided that the balance of representation was equally allocated between the two sides. The proposal also provided that an executive director and support staff be employed as the Board deemed necessary, and that an Advisory Committee, equally representative of the manufacturing and aftermarket industries, be appointed by the Governing Board to assist in recommending policies to effectuate the purposes of the agreement.

In contrast, the manufacturers objected to the idea that ASA and NADA, which had openly aligned themselves with the manufacturers throughout the discussions, be considered as part of the manufacturer contingent on the board. They further proposed that the composition of the board be left open for future discussion. According to the proposal, a “special working group” comprised of the four parties in the manufacturer contingent—the Alliance, AIAM, ASA and NADA—and CARE and AAIA, would “direct and implement all legal and operational steps necessary to establish the NASTF...” Not surprisingly, CARE was concerned about the lopsided representation of the manufacturer contingent to a working group that would be tasked with setting up NASTF. In addition, we were equally concerned that decisions regarding the governance of NASTF, including the composition of the first board, be postponed until some unspecified date in the future. CARE was fearful that the new organization would be severely hampered by disputes over governance issues and wanted to resolve these during the negotiation process by specifying the procedure for appointing representatives to the first board. Under the proposal from AAIA and CARE, once the

board was organized, there would be nothing to prevent the addition of other members that were determined by the board to be necessary and appropriate to carry out the functions of the reorganized NASTF. The car companies would not, however, agree to an even division of the NASTF Board.

## **2. Tools and Tool Information**

CARE also believes it is crucial that any self-regulatory system require that automobile manufacturers make their tools and tool information available to the aftermarket. Nonetheless, the manufacturers would not commit to making available to the aftermarket tools possessing the same diagnostic and repair capabilities that are available to dealerships. Without such a commitment, tools purchased by independent technicians from the manufacturers may not contain needed capabilities to complete a repair.

In addition, CARE was seeking a commitment that the manufacturers make available to tool companies the information needed to manufacture tools containing the same diagnostic and repair capabilities that are available on dealer tools, subject to reasonable licensing and security requirements. Independent technicians would otherwise be forced to purchase required tools only at prices set by the automobile manufacturers. Given the complexity of this issue, CARE was willing to finalize at a later time the details of how such information would be made available and how the agreement would be enforced, provided that the manufacturers made a commitment to fully release needed tool information. The manufacturers would not, however, agree to these terms. In fact, the manufacturers sought to limit any obligation regarding tool information to information needed to produce only “diagnostic scan” tools (a requirement already in the Clean Air Act) and tire pressure monitoring system diagnostic tools. We believed this limitation would potentially restrict the aftermarket’s ability to obtain diagnostic and repair capabilities necessary to service new technologies that may develop in the future.



### **3. Anti-theft Initialization Information**

Many independent repair shops find it increasingly difficult, if not impossible, to complete repairs on cars that contain immobilizer systems designed to prevent the theft of a car. By way of background, it is useful to understand some of the mechanics of a car's immobilizer. Immobilizer systems require a "handshake" between a chip in the ignition key and a chip placed on an on-board computer. Unless the handshake occurs, the car cannot be started. If a vehicle computer that contains the immobilizer chip is changed, the system must be "reinitialized" in order for the vehicle to be restarted following the repair. Since an immobilizer is tied into multiple different systems of a vehicle depending on the manufacturer's design, technicians need access to manufacturer information about the immobilizer system such that the technician can diagnose and repair problems related to the immobilizer and can reinitialize any vehicle system required to start the vehicle following a repair.

CARE therefore proposed language that would require the manufacturers to make available anti-theft initialization information and other information, including any software, necessary for the proper installation of on-board computers or necessary for the completion of any repair on vehicles that employ integral vehicle security systems. CARE was not seeking information to build an immobilizer system; only the information needed to restart a car following a repair.

Although some manufacturers routinely make this information available now, the representatives for the Alliance and AIAM indicated that at least one of its members did not have the ability to provide this information, and that several manufacturers objected in general to the requirement that software be provided in connection with any tool. This was the case notwithstanding that such information is routinely provided to franchised dealerships.

### **4. Service Information**

Manufacturers maintain “hotlines” for their dealers to call with questions regarding diagnosis and service, and publish technical service bulletins and manuals to distribute service information. Although CARE was not seeking an identical “hotline” process for making the service information available to the aftermarket, we were seeking a requirement that service information be provided to the aftermarket in a similar manner and at the same time it is provided by a manufacturer to its dealerships. The manufacturers were unwilling to agree to an equivalency requirement for service information that is provided through the hotlines but is not yet communicated in a formal manner to all of their dealerships. This position is especially troubling to CARE since it indicated an outright refusal to place the aftermarket on the same footing with franchised dealerships in regard to access to basic service and repair information.

## **5. Cost of Tools and Service Information**

Late in the negotiations we learned that although the manufacturers had agreed in the “voluntary standards” to provide information and tools at a reasonable price, they would not agree to any enforcement of this commitment. Although antitrust issues could make it difficult for NASTF to resolve disputes over the reasonableness of the cost of information or tools, we did not believe these concerns applied equally to an independent third party dispute resolution organization.

In an effort to address our most serious concerns about the cost of tools and information, we offered a compromise that would address situations when such information or tools are offered at a price that is viewed as predatory, meaning that the price is so high as to make it, for all intents and purposes, unavailable to the aftermarket. Our proposed language would have allowed the resolution entity to make a finding that the information was not made available because it was offered only at an “unreasonably prohibitive cost” to the aftermarket. We believed that the focus on cost (as opposed to price), would alleviate anticompetitive concerns, and that use of the phrase

“unreasonably prohibitive” would limit any inquiry to cases involving “price gouging” or the use of price as a barrier to disclosing information to the aftermarket.

Notwithstanding our attempt at compromise, the manufacturers indicated that they would not agree to any enforcement of a reasonable price requirement under any circumstances. In fact, they refused our offer even if it received a favorable opinion by an independent legal expert chosen by the CBBB, thus signaling that their objection was primarily based on so called “policy” reasons as opposed to legal concerns.

## **6. Penalties**

CARE and AAIA initially sought a provision that would have allowed the third party enforcement entity, upon reaching a final decision that a manufacturer should have provided information to a technician but failed to do so, to require the manufacturer to compensate the technician in an amount equal to three times the profit he would have earned for the repair. The treble damages approach was an attempt to compensate the technician for the loss of the repair in question, and any future work he was likely to have received from the customer.

The manufacturers objected to treble requirement and ultimately proposed a single payment of \$2,000 as compensation for a successful challenge against a manufacturer. After much consideration, CARE and AAIA agreed to this amount, provided that there would be some incentive to ensure that the award is paid in a timely manner. We therefore proposed an “escalation” clause that would have allowed the enforcement entity to impose an additional compensation remedy of \$11,000 per day for each day the initial amount remained unpaid following the due date.

The manufacturers objected to this compromise and offered no suggestion for bridging the gap in our positions.

### **III. LEGISLATION IS NEEDED TO ENSURE EQUAL ACCESS TO SERVICE, REPAIR AND TOOL INFORMATION AND TOOLS**

As described above, CARE and AAIA, together with representatives from the associations representing the automobile manufacturers and dealers, and ASA, were unsuccessful in reaching a satisfactory self-regulatory solution that would have met the criteria applied by the FTC in evaluating such programs. As such, the aftermarket industry is left with the current NASTF process, which, as discussed previously, is neither effective nor independent. In light of the current problems facing aftermarket repair facilities seeking manufacturer information and tools needed to complete service work and repairs on cars, CARE strongly supports the passage of H.R. 2048.

H.R. 2048 sets out reasonable and enforceable standards for mandating the disclosure of information to the aftermarket. It states, “the same service and training information related to vehicle repair shall be made available in the same manner and extent as it is made available to franchised dealerships, and shall include all information needed to activate all controls that can be activated by a franchised dealership.” By linking the disclosure obligation of the manufacturer to the information that is currently provided to franchised dealerships, the legislation is carefully crafted to create a level playing field for service information and avoids trade secret issues. Indeed, the manufacturer contingent did not raise any concerns about the disclosure of proprietary information once it understood that CARE and AAIA were seeking only an equivalency requirement in relation to franchised dealerships.

CARE also supports the bill’s requirement that diagnostic tools and capabilities related to vehicle repair that are made available to franchised dealerships also be made available to independent repair facilities, and to the companies from which they normally purchase diagnostic tools. This provision will ensure that tool information is made available to tool companies seeking to manufacture generic

tools and support a competitive market and lower costs for independent repair facilities seeking to purchase tools.

Finally, CARE supports giving the FTC authority to enforce the disclosure requirements of the bill. In that the bill's ultimate goal is to ensure that American consumers have the opportunity to choose among competing repair facilities for convenient, reliable and affordable repair of their vehicles, the FTC, as the nation's watch dog for consumers, is uniquely positioned to promulgate rules to effectively carry out the bill's mandate. The FTC has both the expertise and experience to draft rules that ensure that disclosures of service information are adequate and meet the equivalency test set out in the legislation.

Thank you for the opportunity to appear today before the Subcommittee. I would be pleased to respond to any questions you may have.